

BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES

In the Matter of the)
Complaint Against)
JEFF LYNCH)

SUMMARY OF FACTS AND STATEMENT OF FINDINGS

Rose Forbes, a candidate for House District 42 in the 1994 general election, filed a complaint against her opponent in the election, Jeff Lynch. The complaint alleges that Jeff Lynch violated Mont. Code Ann. § 13-35-234 by making false statements in a campaign flier.

SUMMARY OF FACTS

1. Rose Forbes and Jeff Lynch were opponents for the seat in House District 42 in the November, 1994 general election. Rep. Forbes defeated candidate Lynch in the election, and is currently serving as representative for the district.

2. During the campaign, candidate Lynch approved the use of a campaign flier which contained several representations concerning Rep. Forbes and her private business, Krantz Flowers and Gifts, Inc.

3. The flier at issue contains the following statements:

"I get bitten by the same tax bite as you"

- Rose Forbes' campaign literature, 1994

Really?

In 1994, Rose Forbes didn't pay her taxes until she was served with a warrant by the County Sheriff's Department. (Source: Warrant # 942114, Cascade County Treasurer's Office)

The flier also contains a reduced reproduction of the warrant. Rep. Forbes contends these statements are false and misleading because the warrant concerns taxes owed by Krantz Flowers and Gifts, Inc., not by Rep. Forbes.

4. Krantz Flowers and Gifts, Inc., is a Montana corporation owned by Rep. Forbes, her husband Doug Forbes, and Doug's father, Dale Forbes. Doug Forbes normally handles the financial aspects of the business, while Rep. Forbes handles the daily operations of the business. Rep. Forbes, Doug Forbes, and Dale Forbes are officers of the corporation.

5. The warrant, dated September 6, 1994, is entitled a "Warrant of Seizure and Praecipe to Sheriff". The warrant is for personal property taxes owed to Cascade County, and assessed against "Krantz Flowers & Gifts", in the amount of \$465.21. The warrant also lists additional penalties, interest and fees, for a total amount due of \$491.14. The warrant directs the Sheriff to "levy upon, take into possession and sell" the personal property of Krantz Flowers and Gifts, Inc., to satisfy the taxes, penalties, interest, and fees.

6. Rep. Forbes explained that Krantz Flowers and Gifts, Inc., occupies several parcels of property on a city block in Great Falls. The business normally receives a number of separate real property tax bills, in addition to personal property tax bills. In May, 1994, Rep. Forbes signed a blank check and gave it, along with the full tax file for Krantz Flowers and Gifts, Inc., to her brother-in-law, requesting that he pay the taxes at the courthouse.

Rep. Forbes stated that personnel at the county treasurer's office computed the tax liability of Krantz Flowers and Gifts, Inc., and the check was filled in for nearly \$12,000 in payment of the taxes. At that time the Forbeses assumed that the taxes owed by Krantz Flowers and Gifts were paid in full.

Rep. Forbes stated she cannot recall seeing a delinquent tax notice from the county. In September, 1994, the "Warrant of Seizure" described in Fact Summary No. 5 was served on Rep. Forbes at Krantz Flowers and Gifts, Inc. Rep. Forbes stated she advised the deputy sheriff who served the warrant that there must be some mistake, as the taxes on the business had been paid in May. Rep. Forbes and her husband eventually learned that although the real property taxes had been paid, the personal property taxes listed in the warrant were still owed. Rep. Forbes paid the \$491.14, and no personal property of Krantz Flowers and Gifts, Inc. was seized.

7. Candidate Lynch stated that he does not believe the flier misrepresents anything. He stated that Rep. Forbes is the day to day manager of the business, is an officer of the corporation, and was personally served with the warrant for past due taxes on her business. He believes that under these circumstances it was accurate to state that Rep. Forbes did not pay "her taxes".

8. The flier also contains the following statements:

"Owning a small business takes sound money management."

- Rose Forbes' campaign literature, 1994.

Really?

Rose Forbes failed to pay an employee her legal wages until ordered to do so by the MT Department of Labor.
(Source: Cascade County District Court File #BDV 93-1029)

The flier also contains a reduced reproduction of a "Transcript of Judgment". Rep. Forbes contends these statements are false and misleading because the judgment ordering payment of wages is against Krantz Flowers and Gifts, Inc., not against Rep. Forbes. Rep. Forbes also contends that the flier fails to indicate that Krantz Flowers and Gifts, Inc. was merely exercising its right under Montana law to contest a wage claim it believed to be unjustified.

9. According to Rep. Forbes, the position of a part-time employee at Krantz Flowers and Gifts, Inc. was eliminated when Rep. Forbes and her partners purchased the business. The employee subsequently filed a wage claim, and Krantz Flowers and Gifts, Inc. denied the claim. Following a hearing it was determined that the employee was entitled to the wages claimed. Krantz Flowers and Gifts, Inc. did not appeal or seek judicial review of the decision. Eventually a judgment directing payment of the wages was obtained from the district court, and the amount was paid out of the corporation's account.

10. Candidate Lynch stated he believes the portion of the flier concerning the wage claim is also accurate. He stated that although an employer has a right to contest disputed wages, it also has an obligation to pay any amount ordered to be paid following a hearing, if it chooses not to appeal or seek judicial review.

STATEMENT OF FINDINGS

Mont. Code Ann. § 13-35-234 provides:

Political criminal libel - misrepresenting voting records. (1) It is unlawful for any person to make or publish any false statement or charge reflecting on any candidate's character or morality or to knowingly misrepresent the voting record or position on public issues of any candidate. A person making such a statement or representation with knowledge of its falsity or with a reckless disregard as to whether it is true or not is guilty of a misdemeanor.

(2) In addition to the misdemeanor penalty of subsection (1), a successful candidate who is adjudicated guilty of violating this section may be removed from office as provided in 13-35-106 and 13-35-107.

This is a criminal statute. A violation can be established only if the evidence supports findings that 1) there was a misrepresentation or false statement, 2) made "with knowledge of its falsity or with a reckless disregard as to whether it is true or not ". Mont. Code Ann. § 13-35-101 states that the "penalty provisions of the election laws of this state are intended to supplement and not to supersede the provisions of the Montana Criminal Code." Mont. Code Ann. § 45-2-101(33) defines "knowingly" as follows:

. . . . [A] person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when the person is aware of the person's own conduct or that the circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when the person is aware that it is highly probable that the result will be caused by the person's conduct. When knowledge of the existence of a particular fact is an element of an offense, knowledge is established if a person is aware of a high probability of its existence. Equivalent terms, such as "knowing" or "with knowledge", have the same meaning.

Applying this definition, to establish a violation in this case it would be necessary to prove that candidate Lynch was "aware of a high probability" that the statements contained in his campaign flier were false.

A violation of the statute can also be proved if there is evidence that a person acted with "reckless disregard". The Compiler's Comments to Mont. Code Ann. § 13-35-234 note that the source of the "standard" in subsection (1) of the statute is "apparently drawn from New York Times v. Sullivan, 376 U.S. 254 (1964)". That case involved a civil libel action filed by a public official against a newspaper. The Supreme Court held that recovery would only be allowed if the public official could prove that the alleged libelous statement was made with "actual malice"; that is, with "knowledge that it was false or with reckless disregard of whether it was false or not." Sullivan, 376 U.S. at 279-280.

In a later case, Herbert v. Lando, 441 U.S. 153 (1979), the Supreme Court, citing Sullivan, stated that "reckless disregard for truth" means that the defendant "in fact entertained serious doubts as to the truth of his publications". The Court noted that such "subjective awareness of probable falsity" may be found if "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Herbert, 441 U.S. at 156-57.

Other cases have held that "reckless disregard" is "more than mere negligence", Major v. Drapeau, 507 A.2d 938, 941 (R.I. 1986); and that "a failure to investigate is not sufficient in itself to establish reckless disregard", Bartimo v. Horsemen's Benevolent and

Protective Association, 771 F.2d 894, 898 (5th Cir. 1985). In Green v. Northern Publishing Co., Inc., 655 P.2d 736, 742 (Alaska 1982), the Court observed:

Reckless disregard, for these purposes, means conduct that is heedless and shows a wanton indifference to consequences; it is conduct which is far more than negligent. [Citation omitted]. There must be sufficient evidence to permit the inference that the defendant must have, in fact, *subjectively entertained serious doubts as to the truth of his statement.* [Italics in original].

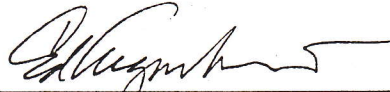
Applying these principles to the facts in this case, the evidence does not support a finding that Mont. Code Ann. § 13-35-234 was violated by candidate Lynch. He believed that he was entitled to include the language indicating that Rep. Forbes failed to pay "her taxes" because: 1) Rep. Forbes handles the daily operations of the business, 2) is an officer of the corporation, and 3) was personally served with the warrant for past due taxes on her business, Krantz Flowers and Gifts, Inc. Candidate Lynch was unquestionably imprecise, and perhaps even careless, in his choice of words. His flier would have been more accurate had it indicated that Rep. Forbes failed to pay the personal property taxes owed by her business, Krantz Flowers and Gifts, Inc. The flier, however, also included a reduced reproduction of the warrant, which clearly indicated it was for taxes owed by Krantz Flowers and Gifts, Inc., and not for taxes owed by Rep. Forbes personally.

The same can be said for the statement regarding the wages owed to a former employee of Krantz Flowers and Gifts, Inc. It would have been more accurate to state that the corporation, rather than Rep. Forbes, failed to pay the wages. Again, however,

candidate Lynch included in the flier a reduced reproduction of the Transcript of Judgment. A reader could clearly ascertain that the wages were owed by Krantz Flowers and Gifts, Inc., and not by Rep. Forbes personally.

While candidate Lynch may have been somewhat negligent in his choice of words in the flier, negligence is not sufficient to establish either knowledge or reckless disregard. There is no evidence that he "subjectively entertained serious doubts" concerning the truth of the statements in the flier. Under the circumstances, there is insufficient evidence to establish that candidate Lynch violated Mont. Code Ann. § 13-35-234.

Dated this 10th day of March, 1995.



Ed Argenbright, Ed.D.
Commissioner of Political Practices